

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

Plaintiff,

v.

COREY THOMAS,

Defendant.  
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ORDER

08-cr-87-bbc

Defendant Corey Thomas has filed a “Motion for New Trial Under Fed. R. Crim. P. 33(b) Based on Newly Discovered Evidence.” In his motion he alleges that the government’s key witnesses lacked credibility and therefore their testimony should not have been accepted. Although defendant characterizes his motion as one brought under Federal Rules of Criminal Procedure, it is actually a motion for modification of his sentence and must be brought pursuant to 28 U.S.C. § 2255 and subject to the rules of the Anti-Terrorism and Effective Death Penalty Act. Any motion that is filed in the sentencing court that is substantively within the scope of § 2255 must be filed as a § 2255 motion. United States v. Carraway, 478 F.3d 845, 848 (7th Cir. 2007)(“The fact that [petitioner] labeled his motion as a request for relief under Fed. R. Crim. P. 33(b) rather than section 2255 is immaterial; it is

the substance of the petitioner's motion that controls how his request for relief should be treated.")

However, before addressing the re-characterized motion, I am required to advise defendant that I am re-characterizing the motion and that this means that it will count as his first § 2255 motion. Castro v. United States, 124 S.Ct. 786, 792 (2004). If defendant proceeds with this motion, he will not have an opportunity to file a second motion to modify or vacate his sentence except in unusual circumstances and then only after he has received permission from the Court of Appeals for the Seventh Circuit for a second filing. See 28 U.S.C. § 2255 ¶ 8. If defendant wishes to proceed, he must advise the court of his intention. Because it is likely that this § 2255 motion will be the only one he will be allowed to file, he should consider carefully whether he wants to add any other § 2255 claims.

#### ORDER

IT IS ORDERED that defendant Corey Thomas's Motion for New Trial Under Fed. R. Crim. P. 33(b) Based on Newly Discovered Evidence is re-characterized as a motion brought pursuant to 28 U.S.C. § 2255. Defendant may have until June 27, 2011, in which to advise the court whether he wishes to withdraw his motion or proceed with it. If he chooses to proceed, he is either to attach a rewritten motion, setting out *all* his challenges to his sentence, or advise the court that his only challenges are the ones set out in his present

motion. I am enclosing a form that defendant may use to file a motion. If defendant does not respond to this order by June 27, 2011, the court will consider his motion to have been withdrawn.

Entered this 18th day of May, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge